No. 547

In the Supreme Court of the United States

OCTOBER TERM, 1942

COMMONWEALTH TRUST COMPANY OF PITTSBURGH AND J. KNOX REED, EXECUTORS OF THE ESTATE OF JOHN W. HARPER, DECEASED, PETITIONERS,

v.

WILLIAM DRISCOLL, INTERNAL REVENUE AGENT IN CHARGE, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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v.

WILLIAM DRISCOLL, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 86a–92a) is reported in 50 F. Supp. 949. The opinion of the Circuit Court of Appeals (R. 102a) is a *per curiam* affirmance, and is reported in 137 F. 2d 653.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 9, 1943 (R. 103a). A peti-

tion for rehearing was filed on July 24, 1943 (R. 104a–109a), and was denied on September 20, 1943 (R. 109a). The petition for a writ of certiorari was filed on December 18, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the corpus of a trust created by the decedent in his lifetime, with respect to which he reserved an unlimited power to make substitutions of securities, was includible in the gross estate under Section 302 (d) of the Revenue Act of 1926, as amended.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in con-

> templation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

This section was amended by Section 401 of the Revenue Act of 1934, c. 277, 48 Stat. 680, and by Section 805 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, but not in any respect here material.

STATEMENT

This is an action to recover a claimed overpayment of federal estate tax upon the estate of John W. Herron, who died on February 13, 1937. The complaint alleged that there was erroneously included in the gross estate (1) so-called "interim income" [1] and (2) the value of two parcels of real estate which the decedent had conveyed to his wife prior to his death and which the Commissioner had determined were transfers made in contemplation of death. The complaint also alleged that proper credit had not been allowed the estate for Pennsylvania inheritance taxes. (R. 86a, 93a–94a.)

The Government admitted that the interim income had erroneously been included in the gross estate, but denied that there was any error in the inclusion of the two parcels of real estate which the decedent had transferred to his wife, and de-

[1] This represents income earned by the estate between the date of the decedent's death and the optional valuation dates on which the executors elected to value the gross estate, pursuant to Section 302 (j) of the Revenue Act of 1926, as added by Section 202 (a) of the Revenue Act of 1935.

nied also that the taxpayers were entitled to any further credit for Pennsylvania inheritance taxes. By way of further defense the Government alleged that there had been a failure to include in the gross estate the value of a trust created by the decedent for the benefit of his daughters; that this trust was properly includible in the gross estate; and that even if it were assumed that the taxpayers were correct with respect to all of their claims, nevertheless there could be no recovery because the amount of tax attributable to the failure to include the trust in the gross estate was greater than the total amount of tax attributable to the claims made by the taxpayers. (R. 86c–87a.)

The case was tried by the District Court without a jury and the following findings of fact with respect to the trust property were made: The trust was created on November 18, 1922, on which date the decedent transferred certain securities to a trustee to collect the income therefrom and distribute it to his two daughters during their natural lives. The trust instrument contained a reservation by the decedent of (R. 97a) "the right to make any substitutions of securities from time to time as he deems advisable." And it was also specifically provided that (R. 97a)—

> the Trustee shall not be held accountable or liable for any diminution in value of any of the securities deposited with the Trustee, or substitutions made therefor, being held liable solely for such lawful trust invest-

ments as it may make and the proper application of the income therefrom.

During the existence of the trust the decedent made many substitutions of securities, some of which were more, equal to, or less than the value of the securities taken out. The decedent also exercised control over the trust to the extent that he directed the purchase and actually purchased securities for the trust of a class not recognized as lawful for trust investments. A few months before his death the decedent relieved the trustee of any liability by reason of such investments. The right which the decedent had retained to make any substitutions in the securities held by the trust as he deemed advisable was without restriction as to the kind or value of the securities substituted, and the decedent had the right to alter, amend or revoke the trust by changing the value of the corpus. (R. 97a–98a.)

ARGUMENT

The courts below concluded that the trust property was includible in the gross estate under Section 302 (d) of the Revenue Act of 1926, *supra,* and since the inclusion of this property more than offsets all of the items claimed by the plaintiffs to have been erroneously included (see the District Court's conclusion of law, No. 5 (R. 99a)), it follows that unless the holdings below on this point are to be reversed, any other question in the case is of academic interest only.

Section 302 (d) requires the inclusion in a decedent's gross estate of the corpus of a trust created by him if the enjoyment thereof "was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke."

With respect to this branch of the case the only question involved is that of the proper construction of the trust; there is no issue with respect to the meaning of Section 302 (d). Positing the correctness of taxpayers' assertion that the section is applicable only where there has been reserved a right to change the economic benefits flowing to the beneficiaries (Pet. 9–10, Br. 18, 19), it is plain that such a right was reserved if, as the Government contended, the right reserved by the decedent to make "any substitutions of securities [in the trust] from time to time" (R. 97a) included the right to substitute securities of lesser value or of no value at all. Although taxpayers contended that this provision contemplated only the substitution of securities of equal value to those withdrawn, this question of construction the District Court resolved against them, concluding that there were no restrictions upon the right to make substitutions (R. 92a, 97a–98a). And the Circuit Court of Appeals accorded the trust a similar construction, since it affirmed the judgment for the reasons given by the District Court

(R. 102a). Thus the power reserved by the decedent was not unlike the reservation of a power by a settlor to purchase securities from the trust at his own price which, of course, is equivalent to a power to revoke. (See *Chandler* v. *Commissioner*, 119 F. 2d 623 (C. C. A. 3d).)

We think that the conclusion reached by the courts below as to the proper construction of this trust is the only sound conclusion which could be reached in view of the facts: (1) That the indenture itself imposed no restriction upon the power of substitution; (2) that it was carefully provided that the trustee was not to be liable (R. 97a) "for any diminution in value of any of the securities deposited with the Trustee, or substitutions made therefor"; and (3) that the parties themselves evidently so construed the trust since the decedent had actually made some substitutions of securities of less value than those taken out. In any event, the proper construction of this trust is certainly not an issue calling for further review by this Court.

Since the issue of the includibility of the trust property in the gross estate under Section 302 (d) is dispositive of this case and since there is no basis for further review of that issue, it is not necessary to consider whether the transfers of the two parcels of realty were made in contemplation of death. However, it has long been settled that

the question whether a transfer was or was not made in contemplation of death is one of fact (*United States* v. *Wells*, 283 U. S. 102; *McCaughn* v. *Real Estate Co.*, 297 U. S. 606; *Colorado Bank* v. *Commissioner*, 305 U. S. 23), and there is ample evidence in the record to support the conclusion reached by the District Court that these transfers were made in contemplation of death.

CONCLUSION

The case was correctly decided by the courts below. There is no conflict and no question of general importance is presented. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
BERNARD CHERTCOFF,
Special Assistants to the Attorney General.

JANUARY 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944